No. 11750

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727, an unincorporated association,

Appellant,

vs.

JAMES L. CAMPBELL, MITCHELL B. JOPLIN, MALCOLM E. KIRK and LOCKHEED AIRCRAFT CORPORATION, a corporation,

Appellees.

BRIEF OF APPELLEES JAMES L. CAMPBELL, MITCHELL B. JOPLIN AND MALCOLM E. KIRK.

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BRIEF OF APPELLEES JAMES L. CAMPBELL, MITCHELL B. JOPLIN AND MALCOLM E. KIRK.

Jurisdiction.

Laid-off for about three weeks during their reemployment year as the result of an impairment of their statutory seniority rank, the three appellee Veterans sued and recovered judgment against their employer, the appellee Company, for their resulting loss of wages, in the United States District Court for the Southern District of California, pursuant to Sec. 8 of the Selective Training and Service Act of 1940, as amended.[1]

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[1]This Act is referred to herein as the "STSA." It appears in *50 U. S. C. A. App., Sec. 301 et seq.*

The appellant Union voluntarily intervened as an additional respondent, to oppose the Veterans'[2] petition; and it appeals from the judgment.

Jurisdiction below rested on STSA,[3] Sec. 8(e), *50 U. S. C. A. App., Sec. 308(e);* and that here on Judicial Code, Sec. 128(a)-First, *28 U. S. Code, Sec. 225(a)-First.*

Statutes Involved.

1. STSA, Secs. 8(b,c,d), 11 and 16(b), which provide as follows:

> Sec. 8(b)—"In the case of any such person, who, in order to perform such training and service (in the armed forces), has left or leaves a position other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—"
>
> . . .
>
> "(B) If such position was in the employ of a private employer, such employer shall restore such person to such position, or to a position of like seniority, status and pay, unless the employ-

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[2]Whenever used herein, the word *"veteran"* means an honorably discharged member of the armed forces who has not, for *as much as one year,* been reemployed in his former position of employment, or its equivalent, and who is still entitled to the protection and benefits of STSA Sec. 8; while *"nonveterans"* refers to all other employees of a veteran's employer, regardless of their military or naval service. The *"Veterans"* means the appellees James L. Campbell, Mitchell B. Joplin and Malcolm E. Kirk, who were veterans when the *res litigiosae* arose.

[3]See Footnote 1, *supra.*

er's circumstances have so changed as to make it impossible or unreasonable to do so;" . . .

Sec. 8(c)—"Any person who is restored to a position in accordance with the provisions of paragraph (A) and (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, *shall be so restored without loss of seniority,* shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

Sec. 8(e)—"*In case any private employer fails or refuses to comply* with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, *to specifically require such employer to comply* with such provisions, and, as an incident thereto, to *compensate* such person for any loss of wages or benefits suffered by reason of such employer's *unlawful action.*"

Sec. 11—". . . any person who . . . in any manner shall knowingly fail or neglect to perform any duty required of him under . . . this Act, . . . shall, upon conviction . . . be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

Sec. 16(b)—(Excepts Sec. 8 from the expiration clause and continues it in effect indefinitely.)

2. The Service Extension Act of 1941, as amended, 50 U. S. C. A. App., Sec. 357, which provides as follows:

> Sec. 7—"Any person who, subsequent to May 1, 1940, and prior to the termination of the authority conferred by section 2 of this joint resolution, shall have entered upon active military or naval service in the land or naval forces of the United States shall be entitled to all the reemployment benefits of section 8 of the Selective Training and Service Act of 1940, as amended." . . .

Questions Involved.

The basic questions are:

A. Is the "seniority" mentioned in STSA, Sec. 8(b,c), statutory or contractual in nature?

B. Is that seniority "subject to" collective bargaining; or is valid collective bargaining necessarily "subject to" such seniority?

C. Under Art. IV, Secs. 3(A), 3(D) and 6 of the 1945 Agreement, the latter incorporating STSA, Sec. 8 therein [R. pp. 58-63, 100-105], was the Veterans' seniority properly subordinated to the new constructive "top seniority" for junior union chairmen (nonveterans) on layoffs during their reemployment year: (a) within the real meaning of the Agreement; or (b) under STSA, Sec. 8(b,c)? That is, was the new, constructive "top seniority" clause ineffective under the Agreement, or void at law, as to veterans for the statutory year of their reemployment?

This case is the reverse of that considered in *Fishgold v. Sullivan Corp.*, 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 1230, 167 A. L. R. 110 (1946).

There a junior veteran[4] claimed superseniority[5] over senior nonveterans on layoffs by virtue of STSA, Sec. 8. Here the Union, by virtue of a new collective bargaining agreement which it assumes to have that meaning, is claiming, on layoffs, superseniority for certain junior nonveterans (officers of the Union) over such veterans despite STSA, Sec. 8(b,c).

The Veterans' position is that STSA, Sec. 8, does not give veterans superseniority over other employees; but that, for one year, it did affirmatively forbid an employer to extend constructive superseniority over veterans to junior nonveterans, where no such superseniority existed when they entered the armed forces; that the 1945 Agreement does not do so, when properly interpreted; and that it would be *pro tanto* void, if it did, as the District Court held.

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[4]See Footnote 2, *supra.*

[5]"*Seniority*" is used in this brief to mean an employee's status or rank in a system under which his employer, on the basis of their respective lengths of service in his employ, determines the order of priority among his employees for certain incidents of employment, such as promotion, demotion, layoff, callback, transfer, job assignments, etc. The word means rank based on length of service, and refers simultaneously and concomitantly to the incidents of employment governed thereby. (See Points II(14-15), pp. 27-28, *infra.*)

"*Superseniority*" means an arbitrarily higher rank in such a system, assigned to an employee out of seniority order. It is in derogation, not in furtherance, of the principle of seniority.

Statement of the Case.[6]

The appellee Veterans are employed as Field and Service Mechanics in the airplane factory of the appellee Company[7] at Burbank, California. The appellant Union[8] is the collective bargaining representative for certain employees in the factory, including Field and Service Mechanics.

Two collective bargaining agreements have been negotiated between the Company and Union from 1941 to date. The first was effective from September 15, 1941, to June 4, 1945, and the second thereafter to date. The two are referred to herein as the 1941 Agreement and the 1945 Agreement, respectively.

Under the seniority system established by the 1941 Agreement, each employee's seniority accumulated from the date of his original hire, and was called "company-wide" seniority. Subject to exceptions not material here, layoffs were made under it, within any occupational group affected by a shortage of work, in the reverse order of the company-wide seniority of the employees therein. That is, actual seniority governed the order of layoffs within occupational groups. [R. pp. 102, 194.]

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[6]The facts appear in two stipulations, one oral and one written, incorporated in the Court's opinions and findings. Exhibits A and B to the written stipulation are identical with the same exhibits to the Veterans' petition. [R. pp. 11-18, 97-109, 111-112, 117-120, 121-27.]

[7]Lockheed Aircraft Corporation.

[8]Aeronautical Industrial District Lodge No. 727 of the International Association of Machinists.

In the 1945 Agreement, substantially this same layoff system was continued by Art. IV, Sec. 3(A), except that Art. IV, Sec. 3(D), provided as follows:

> "(D) Top Seniority for Union Chairmen for Purpose of Layoffs.—For the purpose of applying the temporary and general layoff procedures, union chairmen who have acquired seniority shall be deemed to have top seniority so long as they remain chairmen." [R. p. 61.]

Under the 1945 Agreement, as under the 1941, actual seniority was followed in making promotions, transfers, etc., with no preference for union chairmen in that regard.

Each Agreement made express provision for the reemployment of veterans. The 1945 Agreement provided in Sec. 6 of Art. IV (the seniority article), that:

> "Employees (other than temporary employees) who shall have left the employment of the Company for the purpose of entering the armed forces of the United States, shall be reemployed by the Company in accordance with the Selective Training and Service Act of 1940, as such Act may be amended." [R. p. 63.]

Each Agreement provided for the selection and duties of union chairmen. They were to cooperate in settling differences arising out of employment in the plant. [R. pp. 19, 49, 103-104.]

While union membership was not a condition of employment under either Agreement, Veterans Joplin and Kirk have been members of the Union since 1943, and Veteran Campbell was a member from November 2, 1942, until March 1, 1946. [R. pp. 13-14, 47-48, 97-98.]

The Veterans were originally hired in 1942-1943, and were employed as Field and Service Mechanics when they left to enter the United States Army in 1944-1945. The 1941 Agreement was then in effect. In 1945-1946, after the new 1945 Agreement became effective, the Veterans were honorably discharged from military service, and within 90 days afterward, applied for and were re-employed as Field and Service Mechanics by the Company.

In June, 1946, within a year after being so restored, in a cut-back under Art. IV, Sec. 3(A), due to a shortage of work for Field and Service Mechanics, each Veteran was laid-off, the Company retaining in its active employ, however, a Field and Service Mechanic who was junior to him in actual seniority, but who was "deemed" to have "top-seniority," under the Union's and Company's then interpretation of Art. IV, Secs. 3(D) and 6 of the 1945 Agreement.

The Veterans protested the layoff. On July 15-16, 1946, they were called-back and put to work.

In the layoff interval, they had suffered a loss of wages as follows: James L. Campbell, $168; Mitchell B. Joplin, $124.56; and Malcolm E. Kirk, $190. [R. p. 107.]

On November 27, 1946, the Veterans filed this suit to recover their loss of wages from the Company, claiming they had not been restored without loss of seniority, and were wrongfully laid-off. [R. pp. 9, 88.] The Company answered denying liability on December 13, 1946. [R. pp. 89-91.] The Union applied for and was permitted, under the *Fishgold Case,* 328 U. S. at pp. 281-284, 291-292, to intervene as an added respondent and to file a separate answer, which it did on January 6, 1947. [R. pp. 92-96.]

From a judgment in favor of the Veterans against the Company for the wages lost, the Union alone has appealed. [R. pp. 111-115.]

Under the *Fishgold Case, supra,* the Union's appealable interest is confined to the legal issue whether the District Court properly held the new "top seniority" clause (Sec. 3(D) either: (a) ineffective as to the Veterans for their reemployment year under Sec. 6, Art. IV, of the Agreement, quoted, *supra;* or (b) void as to them for the same period because unlawful under STSA, Sec. 8(c).

In preparation for the trial, the parties filed a written stipulation of facts on January 24, 1947. [R. pp. 97-107.]

In view of the then pendency before the United States Supreme Court of the case of *Trailmobile Co. v. Whirls,* 331 U. S. 40, 67 S. Ct. 982, 91 L. Ed. 939 (1947), which involved a related seniority issue, the District Court did not decide this case until after the decision in that case became available in April, 1947.

Previously, all District Courts which had passed on the legality of "top seniority for union officials" clauses, inserted in collective bargaining agreements during the absence of veterans in the armed forces, had held such clauses void and ineffective as to such veterans during their reemployment year.

Gauweiler v. Elastic Stop Nut Corp., 69 Fed Supp. 294 (D. C., N. J., 1946);

DiMaggio v. Elastic Stop Nut Corp., 11 C. C. H. Labor Cases p. 70072, No. 63,449 (D. C., N. J., 1946);

Koury v. Elastic Stop Nut Corp., 11 C. C. H. Labor Cases p. 70071, No. 63,448 (D. C., N. J., 1946);

Payne v. Wright Aeronautical Corp. (D. C., N. J., 1946, unreported).

On April 25, 1947, the District Court orally ruled in favor of the Veterans in accordance with these cases, and the *Trailmobile Case,* in an opinion appearing at pages 117-120 of the Record. Formal findings and judgment had not been entered, however, when on May 20, 1947, in one day, the Third Circuit Court of Appeals reserved all four of the above "anti-top seniority for union officials" decisions.

The reversing opinions are as follows:

Gauweiler v. Elastic Stop Nut Corp.,[9] 162 F. (2d) 448 (3 C. C. A., 1947);

DiMaggio v. Elastic Stop Nut Corp., 162 F. (2d) 546 (3 C. C. A., 1947);

Koury v. Elastic Stop Nut Corp., 162 F. (2d) 544 (3 C. C. A., 1947);

Payne v. Wright Aeronautical Corp., 162 F. (2d) 549 (3 C. C. A., 1947).

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[9]"*Gauweiler Cases*" is used herein to refer collectively to the four opinions of the Third Circuit Court of Appeals in the *Gauweiler, DiMaggio, Koury* and *Payne Cases* cited above. The collective name is proper since the cases were all decided the same day by the same Court, on similar facts, and the other three refer to the *Gauweiler Case* as authority.

Thereafter, upon application of the appellant Union the District Court reopened this case for further hearing. After reargument and a *further stipulation,* however, the District Court again ruled in favor of the Veterans on July 15, 1947, and awarded judgment for them against the Company. [R. pp. 108-110, 121-127.]

The *further stipulation* considered by the Court at the rehearing was as follows:

> "That in the operation of the business of Lockheed, the defendant corporation has operated, first, under the policy of complying with the contract granting union chairmen top seniority and applying that provision to veterans returning from the service; that, secondly, Lockheed has operated under the policy of employing and retaining in their employment veterans, and not considering that the provision of the contract giving union chairmen top seniority is binding upon those veterans; and that *the application of either policy has not proved inconvenient to the company.*" [R. pp. 125-126.]

This further stipulation distinguishes this case, on its facts, from the "impossible" or "impractical" situation envisioned in the majority opinions in the *Payne* and *DiMaggio Cases, supra* (162 F. (2d) 547-8, 551).

ARGUMENT.

The judgment should be affirmed because:

1. The "top seniority" clause discriminated against veterans as a class, differently from nonveterans, since they were separately classified for seniority purposes by statute and agreement. The veterans were secured against any loss of seniority rank thereunder; other employees were not. The argument that there was "equal discrimination" against veterans and others is irrelevant and incorrect.

2. Superseniority for union chairmen was properly held ineffective as to the Veterans because:

Their seniority was fixed by statute incorporated in Art. IV, Sec. 6, of the 1945 Agreement. This *statutory seniority* was not adversely alterable in favor of anyone. The Company breached the Agreement by subordinating the seniority rank so fixed to constructive superseniority for junior chairmen in the layoff. If Sec. 3(D), Art. IV, was intended to have that effect, it was unlawful.

The minimum seniority (both the rank and rights appurtenant) of a veteran on reemployment is precisely fixed by law; and is not subject to impairment through collective bargaining, any more than his right to "like status" and "like pay," or his right to wait 90 days before applying for reemployment, or other rights created by the reemployment law. All are immutable through collective bargaining.

Like other labor laws, such as those protecting women and children, regulating wages, hours, safety, etc., the veterans reemployment law is neither inconsistent with the right of collective bargaining, nor

subject to impairment or evasion by collective bargaining. An employer cannot escape his duties under labor laws through collective bargaining; and a collective bargaining representative, as such, has no authority to waive the protection of such laws for the statutory beneficiaries. Collective bargaining is subject to existing labor laws; not contrary to them.

3. The *Gauweiler Cases* are unique and unsound in holding veterans' statutory seniority rights subject to collective bargaining; they were decided by a divided Court; are inapplicable to this case on the facts; and should not be followed by this Court.

I.

The "Top Seniority" Clause Discriminated Against Veterans as a Class, Differently From Nonveterans, Since They Were Separately Classified for Seniority Purposes by Statute and Agreement. Veterans Were Secured Against Any Loss of Seniority Rank Thereunder, While Others Were Not. The Argument That There Was "Equal Discrimination" Is Irrelevant and Incorrect.

1. The 1945 Agreement did not have the effect of subordinating the seniority rank of veterans[10] to constructive superseniority for junior union chairmen on layoffs, as the District Court properly held [R. p. 114]; because the terms of STSA, Sec. 8 were expressly incorporated into Art. IV, Secs. 3(A), 3(D) and 6 of the Agreement, and so *exempted veterans* from any such demotion, or

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[10]See Footnote 2, *supra*.

impairment of their restored seniority rank, *for one year.* [R. pp. 60, 61, 63.]

50 U. S. C. A. App., Sec. 308(b, c).

See Points II(1) (a, b, c, e) and II (2, 6), *infra,* pp. 18-20, 22-25.

2. Regardless of Sec. 6, the same exemption would be deemed written by law into Sec. 3(D), in view of STSA, Sec. 8(b,c), because—

> "Laws which subsist at the time and place of the making of a contract and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms . . . This principle embraces alike those which affect its validity, construction, discharge or enforcement."

Home B. & L. Assn. v. Blaisdell, 290 U. S. 398, 429-430, 54 S. Ct. 231, 78 L. ed. 413, 88 A. L. R. 1481;

Farmers & M. Bank v. Fed. Res. Bank, 262 U. S. 649, 660, 43 S. Ct. 651, 67 L. Ed. 1157, 1164;

State of Washington v. Maricopa County, Ariz., 152 F. (2d) 556, 559 (C. C. A. 9, 1945), cert. den. 327 U. S. 799;

Northwest Steel R. Mills v. Com. Int. Rev., 110 F. (2d) 286, 289 (C. C. A. 9, 1940), rev'd on other grounds 311 U. S. 49;

United States v. Dietrich, 126 Fed. 671, 675 (C. C. Neb., 1904);

Hales v. Snowden, 19 Cal. App. (2d) 366, 65 P. (2d) 847, cert. den. 302 U. S. 715;

Indust. Com. v. Aetna L. Ins. Co., 64 Colo. 480, 174 Pac. 589, 3 A. L. R. 1343;

Texts: 17 *C. J. S.* 782-785, *Contracts,* Sec. 330; 12 *Am. Jur.* 769-772, *Contracts,* Sec. 240.

3. The Congress in STSA, Sec. 8, and the Union and Company in Art. IV, Sec. 6, each classified veterans (for one year) separately and apart from other employees, with especial reference to this particular matter of their "seniority." There is no mistaking the intent. The statute, which twice mentions seniority, was adopted in the *seniority article* (Art. IV) of the 1945 Agreement itself. [R. pp. 58-63.]

4. Nonveterans are excluded from this "extraordinary statutory security" extended to veterans by law and contract.

Trailmobile Case, 331 U. S. at pp. 57, 59-60;
Point III(5), *infra,* pp. 37-38.

5. Since it recognized that veterans' seniority is statutory, and not identical with that of other employees, the Union should be estopped to argue the contrary, as it seeks to do. [R. p. 61; Applt. Br. 5-10.]

31 *C. J. S.* 232, 393, Estoppel, Secs. 55(b), 123, 128.

6. The Union admits (or claims) the Veterans suffered a "loss of seniority"; but argues the irrelevant point that there was "no discrimination against veterans as such," which point is incorrect as well as irrelevant. *The STSA forbids any "loss of seniority" at all, in favor of anyone.* The protected veterans were the sole discriminatees in this layoff, for they alone had a legal right to *exemption* from the seniority demotion incident to the superseniority provision. [See Appl. Br. p. 3; and Points I(1-4), *supra.*]

7. The Union's argument that there was "equal discrimination" against all employees not union chairmen,

and consequently "no discrimination against veterans as such," begs the question. This could be true only if it be assumed that all discriminatees had identical legal rights, which, in this case, is to assume the non-existence or inefficacy of Sec. 6, Art. IV of the Agreement and STSA, Sec. 8(b,c), in so far as seniority rights are concerned. This being its end argument, the Union would beg the point at the outset with the premise of "equal discrimination."

8. This same flaw in logic appears in the majority opinion in the *Gauweiler Case*, where it is said:

> "It is to be emphasized that in our case there is no suggestion of discrimination against veteran-employees . . . Discrimination would, obviously, change the whole picture . . .
>
> "The considerations above stated bring us to the conclusion that the employee absent in war service is bound by the non-discriminatory arrangements made between the bargaining unit and the employer during his absence . . . The veteran does not lose by his absence. He simply remains as if he were on the job and subject to the well-established and accepted routine of collective bargaining, so far as this particular right of seniority is concerned."
>
> *Gauweiler Case,* 162 F. (2d) at pp. 451-452.

9. We are unable to see how this statement of law may be reconciled with statute and precedent. [See 331 U. S. 56, 58-59, 60; STSA, Sec. 8(b,c).] But, aside from that, the *Gauweiler Case* majority here appears to be pursuing this reasoning:

> Veterans have no more security from loss of seniority through collective bargaining than nonveterans

(who have none), because (and only because) there is no discrimination against them as veterans; which premise, in turn, could be true only if veterans have no more security from loss of seniority through collective bargaining than nonveterans (who have none), which could be true only if there is "no discrimination," which depends on "no security," which depends on "no discrimination," which depends etc. etc.

10. This would seem to be reasoning in a circle. The basic holding of the majority in the *Gauweiler Case,* of course, is that *veterans have no security against loss of seniority through collective bargaining for the reemployment year,* and are subject to the *same hazards* in that regard as nonveterans. Only on *that premise* could it be said that there was "no discrimination against veterans as such."

11. In this case, there was discrimination against veterans as a class, in that their rights under the *statute and agreement* were violated; and nonveterans had no share whatever in those rights.

12. There was factual discrimination against veterans also, notwithstanding the Union's argument; for, by reason of their absence in military service, the Veterans lost opportunities for becoming union chairmen, and these places were filled to their disadvantage by other employes.

Payne Case, 162 F. (2d) at pp. 551-552.

II.

The Superseniority for Union Chairmen Provision Was Void and Ineffective as to the Veterans During Their Reemployment Year.

1. In the *Trailmobile Case,* 331 U. S. at pp. 53-60, the Supreme Court considered and passed on every phase of law and fact involved here, resolving them all in favor of the Veterans, in the following language:

(a) Footnote 23, 331 U. S. at p. 53:

> "The position to which an employee must be restored is either the position previously held or 'a position of like seniority, status, and pay.' See note 18. *It is thus recognized that part of the restored 'position' is the seniority accrued prior to service in the armed forces and, under the Fishgold case, during service. 'Seniority' is part of 'position,' and therefore, when the Act states in subsection (c) that the veteran may not be discharged 'from such position' it means both from the job itself and from the seniority which is part of the job.*" . . .

(b) At Page 55:

> "The real trouble however is in the basic premise both grammatically and substantively. It assumes not only the complete independence of the last clause of §8 from what precedes, but also that employment within the meaning of the Act is something wholly distinct and separate from its incidents, *including seniority, rates of pay, etc.* We think, however, that the idea of total severability is altogether untenable. To accept it would do violence both to the grammatical and to the substantive structure of the statute.

"The clause is neither an independent sentence nor a disconnected prohibition without significant relationship to what precedes. 'From such position' has no meaning severed from the prior language. *The restoration provisions define the very character of the place not only to which the veteran must be restored but equally from which he is not to be discharged.* Neither grammatically nor substantively could the discharge provision be given effect without reference to the prior 'restoration' clauses. *Fishgold v. Sullivan Drydock & Repair Corp., supra.* Indeed such reference is explicit both in the phrase 'from such position' and in the time provision itself, namely, 'within one year after such restoration.'" . . .

(c) At Page 56:

". . . The Court held, indeed, that the Act did not give him standing to *outrank* nonveteran employees who had *more than the amount of seniority to which he was entitled* and to which he had been restored; in other words, that he was not given so-called 'superseniority.' But, it also squarely held that he was given security not only against complete discharge, but *also against demotion, for the statutory year.* And demotion was held to mean *impairment of 'other rights,'* including his restored *statutory seniority* for that year. 'If within the statutory period he is demoted, his status, which the Act was designed to protect, has been affected and *the old employment relationship has been changed. He would then lose his old position and acquire an inferior one.* He would within the meaning of §8(c) be *'discharged from such position.'*" . . . .

(d) At Page 57:

"It is therefore clear that Congress did not confer the rights given as incidents of the restoration simply to leave the employer free to nullify them at will, once he had made it. Equally clearly Congress did not create them to be operative for the vaguely indefinite and variously applicable period of a reasonable time. But we cannot agree that they were given to last as long as the employment continues, *unaffected by expiration of the one-year period.*

"To accept this conclusion, as we have said, would mean 'freezing' the incidents of the employment indefinitely while 'freezing' the right to employment itself for only one year. As long as the employee might remain in his job, his pay could not be reduced, his seniority could not be decreased, insurance and other benefits could not be adversely affected. And this would be true, although for valid reasons *all of those rights could be changed to the disadvantage of nonveteran employees* having equal or greater seniority and other rights than those of the veteran with restored *statutory standing.* The reemployed veteran thus not only would be restored to his job simply, as the Fishgold case required, 'so that he does not lose ground by reason of his absence.' 328 U. S. at 285. He would gain advantages *beyond the statutory year* over such non-veteran employees."

(e) At Pages 58-59:

"It is clear, of course, that *this statutory addition to the veteran's seniority status* is not automatically deducted from it at the end of his first year of reemployment. But the Fishgold decision also ruled expressly that he was not to gain advantage *beyond*

such restoration, by virtue of the Act's provisions, so as to acquire 'an increase in seniority over what he would have had if he had never entered the armed services . . . No step-up or gain in priority can be fairly implied." 328 U. S. at 285-286.

"For the statutory year indeed this meant that the restored rights could not be altered adversely by the usual processes of collective bargaining or of the employer's administration of general business policy. But if this *extraordinary statutory security* were to be extended beyond the statutory year, the restored veteran would acquire not simply equality with non-veteran employees having identical status as of the time he returned to work. He would acquire *indefinite statutory priority over nonveteran employees,* a preferred status which we think not only inharmonious with the basic Fishgold rationalization, but beyond the protection contemplated by Congress."

(f) At Pages 59-60:

". . . Whether or not the collective agreement was valid, or infringed rights of Whirls and other members of that group apart from rights given by §8(c), is not before us, for reasons we have stated. The only question here and the only one we decide is that §8(c), although giving the reemployed veteran *a special statutory standing in relation to 'other rights,' as defined in the Fishgold case, during the statutory year, and creating to that extent a preference for him over nonveterans,* did not extend that preference for a longer time."

(Note: The collective agreement in *Whirls'* case was not negotiated until over a year after his restoration with full statutory seniority, 331 U. S. 43-44.)

2. The clear meaning of this language of the Supreme Court is:

> A veteran's minimum seniority rank on reemployment is fixed by statute, not contract, and is *statutory* rather than *contractual.* (Point II(1)(a, c, e), *supra.*) This rank is determined by adding the period of his absence in the armed forces to his seniority at the time of induction. The rank so fixed is as much a part of the position to which he must be restored as his pay or "other benefits" mentioned in the law. (Point II(1)(a, b, d), *supra.*) The restoration is to be "as nearly a complete substitute for the original job as was possible." [*Fishgold Case,* 328 U. S. at p. 286; Point II(1)(b), *supra.*] Although it is by reference to the former that certain precise characteristics and incidents of the restored position are defined by the law, yet it is the reemployment law itself, not a collective bargaining representative, which fixes the specific assured incidents of the new position. The minimum incidents so fixed are not subject to the hazards of subsequent collective bargaining, although for valid reasons all such incidents could be changed thereby to the disadvantage of a nonveteran employee having equal or greater seniority than a veteran. (Point II(1)(b, d, e), *supra.*) Any impairment of the veteran's seniority rank for the reemployment year is unlawful, whether it occurs as a "loss of seniority" at the time of his reemployment, or as a "discharge" or "demotion" thereafter. (Point II(1) (c), *supra.*) In these respects, a veteran enjoys "extraordinary statutory security" and "statutory priority over nonveterans," and a "prefer-

ence over nonveterans" throughout his reemployment year. (Point II(1)(e, f), *supra.*)

If this is a fair statement of the holding in the *Trailmobile* and *Fishgold Cases,* the judgment below should be affirmed.

3. The Company found no difficulty in applying Sec. 6, Art. IV, and STSA, Sec. 8, when it changed its policies to conform. [R. pp. 125-126.] There is no uncertainty about the layoff procedure required, so long as it is kept in mind that *it is not the veterans, but union chairmen, who are claiming superseniority.* The veterans have no affirmative right to an increase in seniority over anyone; but merely a negative, defensive right *not to be demoted* in seniority under those claiming superseniority over them. Therefore, the required procedure is:

> As the layoff line advances up the seniority roster in accordance with Sec. 3(A), Art. IV, there are to be skipped: (1) union chairmen, and (2) any veterans who (a) have been reemployed less than a year and (b) have more seniority than a junior union chairman who has been retained out of actual seniority order under Sec. 3(D), Art. IV. Thereafter, the chairmen and veterans who are so skipped are to be laid-off in their actual seniority order *inter sese,* if a cutback to that extent should be necessary.

4. There can be no doubt about the *layoff rank of anyone* under this system. The merry-go-round of seniority rights envisioned by Judge Biggs in the *DiMaggio Case* (162 F. (2d) at p. 548) has no legal basis. A senior non-exempt nonveteran, so laid-off, would have no legitimate complaint at the proper retention of junior

union chairmen or veterans, if the layoffs are made as stated.

5. It is true that, under this system, some veteran, but not all, will enjoy for their reemployment year a better seniority status than some nonveterans who are not union chairmen. *But, this is the only alternative to an unlawful demotion,* and there is certainly *nothing* in the statute or in any Supreme Court decision that *forbids the preservation of a veteran's seniority rank,* simply because that will *improve his seniority benefits* under conditions created by collective bargaining. The law intended that he should enjoy any betterments in his former position.

Parker v. Maynard Boyce, Inc., 74 F. Supp. 581 (D. C., Calif., 1946);

Freeman v. Gateway Baking Co., 68 F. Supp. 383 D. C., Ark., 1946);

Morris v. C. & O. R. C., 75 F. Supp. 429 (D. C., Ind., 1947);

Kephart v. United States, 74 F. Supp. 578 (Ct. Cl., 1947).

6. "Union agreements may add to the veteran's reemployment rights, but they are invalid to the extent that they cut down the rights granted to war veterans by the reemployment statutes."

Teller's Labor Disputes & Collective Bargaining (Cum. Sup., Apr., 1947), Sec. 423J, Vol. 2, p. 301;

50 *U. S. C. A. App.,* Sec. 308(b, c);

Fishgold Case, 328 U. S. at pp. 283-285;

Trailmobile Case, 331 at pp. 53-60, quoted in Point II(1)(c, d, e), *supra*;

Payne Case, 162 F. (2d) at pp. 551-552;

Morris v. C. & O. R. Co., supra;

Bryant v. Brotherhood, 74 F. Supp. 510 (D. C., La., 1947);

Armstrong v. Tenn. C. I. & R. Co., 73 F. Supp. 329 (D. C., Ala., 1947);

Curtis v. Railroad P. I. Agency, 71 F. Supp. 153 (D. C., Mass., 1947);

Unruh v. No. Amer. Creameries, Inc., 70 F. Supp. 36 (D. C., N. D., 1947).

7. The reemployment provisions "define the *very character* of the place . . . to which the veteran must be restored," in the words of the Supreme Court. [Point II(1)(b), *supra.*] So, for the sake of argument, if it be supposed that the merry-go-round of seniority rights did result from the new superseniority clause, with all the complexities foreseen in the *DiMaggio* and *Payne Cases, i. e.,* if it be presumed that there is *no rational way* to give simultaneous effect to superseniority for union chairmen and to preserve veterans from a "loss of seniority" for one year. Which then should prevail, the law or the agreement? The answer is in the question itself; and it is not the same answer as was given in the *Gauweiler Cases.*

8. The "merry-go-round" view and the "non-discriminatory" premise are alike incorrect, since each assumes at the outset the ineffectiveness of STSA, Sec. 8(b, c) to guarantee a veteran from "loss of seniority" for one year. Each is a mid-way step in a departure from the precise direction of the statute.

9. A veteran's *seniority rank* over junior employees must be restored to him on his return from the armed

forces. Specifically, the STSA provides that he is to be considered as having been on "furlough or leave of absence," and must be restored to *"a position of like seniority,"* and *"without loss of seniority,"* and "shall not be discharged (demoted) *from such position* . . . within one year." The effect of this is to "define the *very character* of the place . . . to which the veteran must be restored" in the seniority system. [*Fishgold Case, supra,* at pp. 286-287; and Point II(1)(a-c), *supra.*] The word "like" expressly refers to the attributes of the Veteran's position when he entered the armed forces; and the context prohibits any thought that it is a vicarious reference to the attributes of the employment of others when he returns [STSA, Sec. 8(b, c)]. Consequently, it would be unlawful for a junior union chairman to be *"deemed* to have top seniority . . . for . . . layoff procedures" over a veteran during the restoration year, under Point II(6), *supra.*

10. The exemption of veterans (for one year) from the superseniority clause would have been sustained, if it had been written at length into the 1945 Agreement. And, it was so written by reference and law. (See Point I (1-4), *supra.*)

11. "Seniority arises only out of contract *or statute.*" —It is not solely contractual, as the Union contends. (App. I, Br. pp. 5-10.)

Footnote 21, Trailmobile Case, 331 U. S. p. 53;

Footnote 5, Gauweiler Case, 162 F. (2d) p. 452;

Elder v. New York Cent. R. Co., 152 F. (2d) 361, 364 (6 C. C. A., 1945);

Note: 142 *A. L. R.* 1055-1056; 47 Yale L. J., 73 (1937).

12. Many seniority systems exist in the public service by virtue of statutes or regulations issued thereunder. These systems are statutory, not contractual in origin.

Code of Federal Regulations (1944 Supp.), Title 5, Part 12, Sec. 12.302 (c, d), 9 Federal Register 13699, Nov. 16, 1944;

5 *U. S. Code,* Secs. 631-633 as modified, 645a(b), 652, 669-670, 707, 861;

Kirkman v. MacMorland, 71 F. Supp. 15 (D. C., Pa., 1947);

Bateman v. Fullen, 28 N. Y. S. (2d) 230 (Sup. Ct. N. Y., 1941);

Waters v. Buck, 36 N. Y. S. (2d) 834 (Sup. Ct., N. Y., 1942);

Kephart v. United States, 74 F. Supp. 578 (Ct. Cl., 1947).

13. The seniority provisions of STSA, Sec. 8(b, c) are alike applicable both to government employees under Sec. 8(b)(A) and to private employees under Sec. 8(b)(B). The mere fact that a union may have had a part in establishing a private employer's seniority system is immaterial. The statute is not concerned with the origins of the systems, but only with the veteran's former rank and place therein. This rank is preserved by law.

14. Seniority is—

"The status secured by length of service for a company, to which certain rights, as promotion, attach."

Webster's New Intntl. Dict. (2d) p. 2278;

142 *A. L. R.* 1055; 47 Yale L. J., p. 73, cited *supra.*

"Seniority" is classed as a synonym, in Mawson's revision of *Roget's International Thesaurus of English Words and Phrases* (Thomas Y. Crowell, Co., N. Y., 1930), p. 47, with the words:

> "Eldership; elders; firstling; *doyen* (Fr.); dean; father; primogeniture."

15. "Seniority" as used in industry may be more precisely defined as—

> An employee's status or rank in a system under which his employer determines, on the basis of their respective lengths of service in his employ, the order of priority among his employees for certain incidents of employment, such as promotions, demotions, layoffs, callbacks, transfers, work assignments, etc. The word means rank fixed by length, of service with reference to the incidents of employment governed by the system; and is a concomitant reference to such system and incidents.
>
> An employee's seniority right is a *quasi*-property right.
>
> *Grand Int. Brotherhood v. Mills,* 43 Ariz. 379, 31 P. (2d) 971, 979 (1934).

16. "Seniority" is used in STSA, Sec. 8(b, c) to refer both to length of service or rank, and to the incidents of employment covered by the system. It adds the term of his service in the armed forces to the veteran's former seniority, and, in this manner, establishes *statutory seniority* for the reemployment year. See Prints II(1)(a, b, c), and II(6-7), *supra.*

Bryant v. Brotherhood, supra.

17. This *statutory seniority right,* along with the other rights embraced in the reemployment provision of STSA, Sec. 8, constitute a "floor" below which the incidents of a veteran's reemployment may not be lawfully reduced. These other rights include:

(a) The right to *wait 90 days* before applying for restoration.

(b) The right thereupon to be restored to his *former position,* although that may involve discharging or breaking a contract with the employee who took his job after induction. [See *Salter v. Becker Roofing Co.,* 65 F. Supp. 633, 636 (D. C., Ala., 1946); *Kay v. General Cable Corp.,* 144 F. (2d) 653 (3 C. C. A., 1944); *Tipper v. No. Pac. R. Co.,* 62 F. Supp. 853, 856 (D. C., Wash., 1945).]

(c) The right, in the alternative, to another position of *"like seniority, status and pay."*

(d) The right to any *ingrade increases* appurtenant to his restored position. [See *Kay v. General Cable Corp.,* 59 F. Supp. 358 and 63 F. Supp. 791 (D. C., N. J., 1945, 1946); *Armstrong v. Tenn. C. I. & Co., supra; Freeman v. Gateway Baking Co., supra; Whitver v. Aalfs Maker Mfg. Co.,* 67 F. Supp. 524 (D. S., Iowa, 1946); *Parker v. Maynard Boyce, Inc., supra; Niemiec v. Seattle-Rainier B. Club,* 67 F. Supp. 705 (D. C., Wash., 1946).]

(e) The right to be deemed to have been on furlough or leave of absence, instead of having quit. [*Boston & Maine R. Co. v. Hayes,* 160 F. (2d) 325 (1 C. C. A., 1947).]

(f) The right to participate in *"insurance benefits* offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer *at the time he* (the veteran) *was inducted,"* etc.

(g) The right to participate in *"other benefits"* so offered by the employer at that time. [See Footnote 25, *Trailmobile Case,* 331 U. S. at pp. 53-60.]

(h) The right *not to be "discharged"* or demoted without cause within one year after such restoration. [*Fishgold Case,* 328 U. S. at p. 286; *Hoyer v. United Dressed Beef Co.,* 67 F. Supp. 730 (D. C., Calif., 1946).]

(i) The right to *access to court* (rather than to grievance procedure) to compel restoration to his proper position, in case of either an unlawful refusal of, or discharge or demotion from, such position.

(j) The right to be compensated for his *loss of wages* suffered by reason of the employer's *"unlawful action."* [*Hall v. Union L. & P. Co.,* 53 F. Supp. 817 (D. C., Ky., 1944]; *Armstrong v. Tenn, C. I. & R. Co., supra.*]

18. The statutory seniority is no more subject to be whittled down by collective bargaining than the rights to sue, to wait 90 days before applying, not to be discharged without cause for one year, to be deemed to have been on leave of absence. The seniority right is identical in nature and reference to the rights to "like pay," "like status," "insurance and other benefits." *These guaranteed minimums are not subject to the hazards of collective bargaining. They are statutory, not contractual in nature.*

They do not depend on collective bargaining for definition or clarification, and cannot be cut down by it. [See Point II(1, 6, 9-16), *supra.*]

19. The incidents of employment to which the STSA, Sec. 8 relate are identified by reference to those inhering in his position when he "left in order to" enter the armed forces.

Fishgold and *Trailmobile Cases, supra*;

Brown v. Luster, 165 F. (2d) 181, 184 (9 C. C. A., 1947);

Grubbs v. Ingalls Iron Works, 66 F. Supp. 550, 554 (D. C., Ala., 1946);

Dacey v. Bethlehem Steel Co., 66 F. Supp. 161 D. C., Mass., 1946);

Morris v. C. & O. R. Co., supra;

Kephart v. United States, supra.

20. It is an "unlawful action" for an employer to fail to restore a veteran "without loss of seniority." And, to coerce, or to cooperate with, an employer to do an unlawful act is an improper, unlawful union objective, which may be enjoined.

50 *U. S. C. A. App.,* Secs. 308(e) and 311;

Restatement and Torts, Vol. 4, Secs. 794-796;

Teller, Labor Dispute & Coll. Bargaining, Vol. 1, Sec. 94, 210 (1940 Ed. and 1946 Cum. Sup.);

Loew's, Inc. v. Basson, 49 F. Supp. 66, 71-72 (D. C., N. Y., 1942);

N. L. R. B. v. Fansteel Metal Corp., 306 U. S. 240, 255-256, 56 S. Ct. 490, 83 L. Ed. 627, 123 A. L. R. 599;

Steele v. L. & N. R. Co. (1944), 323 U. S. 192 at pages 204-207, 65 S. Ct. 226, 89 L. Ed. 173;

Tunstall v. Brotherhood (1944), 323 U. S. 210 at pages 212-214, 65 S. Ct. 235, 89 L. Ed. 187;

Markham & Callow v. Int. Woodworkers, etc., 170 Ore. 517, 135 P. (2d) 727, 749.

21. "An agreement which cannot be performed without a violation of the law is illegal, whether or not the parties knew the law."

12 *Am. Jur.* 647, Contracts, Sec. 153;

17 *C. J. S.,* 545-548, Contracts, Secs. 191, 194, notes 92-94 and 11;

Sage v. Hampe, 235 U. S. 99, 104-105, 35 S. Ct. 94, 59 L. Ed. 147, 150 (1914);

National Licorice Co. v. N. L. R. B., 309 U. S. 350, 359-360, 60 S. Ct. 569, 84 L. Ed. 799 (1940);

A. T. & S. F. R. Co. v. Judson Freight Forwarding Co., 49 F. Supp. 789, 785 (D. C., So. Calif., 1943), affirmed 150 F. (2d) 210;

Fitzsimons v. Eagle Brewing Co., 107 F. (2d) 712, 126 A. L. R. 681 (3 C. C. A., 1939), and note 126 A. L. R. 685;

50 *U. S. C. A. App.,* Secs. 308(e), 311.

22. STSA, Sec. 8 is a new law regulating the employment of a particular class of employees (veterans), similar to laws regulating the employment of women and children, wages and hours, safety, etc. Like other such labor laws, the STSA, Sec. 8 confers statutory protection and individual rights upon particular employees. See, for example:

Fair Labor Standards Act, 29 U. S. C., Secs. 206-207, 212;

National Labor Relations Act, 29 U. S. C., Secs. 157-160;

Safety Appliance Act, 45 U. S. C., Secs. 1-12, 17, 23, 62-63, 65;

Federal Employer's Liability Act, 45 U. S. C., Secs. 51-60;

Railway Labor Act, 45 U. S. Code, Secs. 151-154, 181 *et seq.;*

California Labor Code:

Subject	Sections
Wages	200-212, 222-224;
Hours	510, 554-555, 601, 607, 750, 800, 850-852;
Women and Children	1182, 1184, 1197-1198, 1250-1253, 1290-1298, 1308, 1350.

23. The individual rights of employees benefited or protected by labor laws cannot be waived by a collective bargaining representative, because

(a) Many of these laws cannot be waived even by the beneficiaries themselves.

31 *Am. Jur., Labor,* Secs. 408, 421-423, 459, 469, 498, pp. 1035, 1042-1043, 1061, 1065, 1078;

12 *Am. Jur.* 661, Contracts, Sec. 166;

Erie R. Co. v. Williams, 233 U. S. 685, 34 S. Ct. 761, 58 L. Ed. 1155, 51 L. R. A. (N. S.) 1097;

Brooklyn Bank v. O'Neal, 324 U. S. 697, 704-707, 65 S. Ct. 895, 89 L. Ed. 1296;

Martino v. Mich. Window Cleaning Co., 327 U. S. 173, 177-178, 66 S. Ct. 379, 90 L. Ed. 603;

West Coast Hotel Co. v. Parrish, 300 U. S. 379, 392-399, 81 L. Ed. 703, 57 S. Ct. 578, 81 L. Ed. 703, 108 A. L. R. 1330.

(b) Waiver is a personal privilege which cannot be exercised through an agent without affirmative authorization.

67 *C. J.* 307, Waiver, Sec. 8.

24. A collective bargaining representative has no inherent authority to waive any individual right secured by the Constitution or laws of the United States to individuals within the bargaining unit it represents.

Steele v. L. & N. R. Co., supra;
Tunstall v. Brotherhood, supra;
Martino v. Mich. Window Cl. Co., supra, p. 33.

25. A collective bargaining representative has no inherent authority to waive a personal seniority right accrued to an individual within the bargaining unit, under a collective agreement then in effect.

Piercy v. L. & N. R. Co. (1923), 198 Ky. 477, 248 S. W. 1042, 33 A. L. R. 322;
Clark v. Claremont Apt. Hotel Co., 19 Wash. (2d) 115, 141 P. (2d) 403, 153 A. L. R. 50, and note pp. 60, 66-72;
Reutschler v. Mo. Pac. R. Co. (1934), 126 Neb. 493, 253 N. W. 694, 95 A. L. R. 1;
Elder v. New York Cent. R. Co., 152 F. (2d) 361, 364 (6 C. C. A., 1945);
Ahlquist v. Alaska Portland Packard Assn. (9 C. C. A., 1930), 39 F. (2d) 348;
The Henry S. Grove (C. C. A., D. C., 1927), 22 F. (2d) 444;
Text: Labor, Secs. 96, 99, 102; 31 *Am. Jur.* 873-874.

26. There is no conflict between the right of collective bargaining secured to employees generally under the National Labor Relations Act and the right of a veteran to be restored under STSA, Sec. 8; any more than there is a conflict in the right of collective bargaining and the laws regulating the employment of women and children, wages and hours, safety, etc., above mentioned. An employer is bound to obey all such laws; collective bargaining cannot free him of the duty as regards any individual employee. The employer and the collective bargaining representative must conduct their negotiations in the light of, and in conformity with, the applicable statutes. (See Points II(6) and II(20-25), *supra.*)

> "A veteran's right to be restored to his former position without loss of seniority is an independent and additional right not to be impaired by other protective benefits accorded him by Sec. 301 *et seq.* of this War Appendix, and collective bargaining agreements entered into pursuant to terms of Wagner Act [Sec. 151 *et seq.* of Title 29] must recognize statutory right of veteran to seniority granted him by Selective Service Act [Section 301 *et seq.*] and any agreement which deprives him of that right is invalid to that extent.
>
> "Court would not presume that Congress in failing to amend National Labor Relations Act, section 151 of Title 29, in enacting Section 301 *et seq.* of this War Appendix intended to permit concerted action of collective bargaining agency and employer to destroy or whittle down statutory right of returning servicemen to restoration to seniority security in his job granted by said sections."
>
> *Bryant v. Brotherhood,* 74 F. Supp. 510, 513 (D. C., La., 1947), cited *supra.*

III.

The Gauweiler Cases Are Unique, Were Decided by a Divided Court, Are Unsound at Law and Inapplicable Here, and Should Not Be Followed by This Court.

1. Prior to the *Gauweiler Cases* (May 20, 1947), no court had held a veteran's statutory seniority right, nor any other reemployment right, alterable adversely to any degree in favor of anyone by collective bargaining. No court has since so held, so far as appears from the reports. Besides being unique in this respect, the *Gauweiler Cases* appear to be the first in which individual rights under labor laws have been held subject to impairment by collective bargaining. (See Point II(20-26), *supra.*)

2. The legitimate scope of a collective bargaining representative's authority was dangerously inflated, beyond all precedent, when the Third Circuit Court of Appeals majority held that individual statutory rights are subject to diminution or abatement through its action. The ramifications of such a rule are almost incalculable. The matter is of no slight importance, and should be considered here. Compare:

Steele v. L. & N. R. Co., supra, at pp. 202-207;

Fishgold Case, supra, at p. 285;

Trailmobile Case, supra, at pp. 58-59;

Piercy v. L. & N. R. Co., supra;

National Licorice Co. v. Labor Board, supra;

N. L. R. B. v. Fansteel Metal Corp., supra;

Southern S. S. Co. v. Labor Board, 316 U. S. 31, 48, 62 S. Ct. 886, 86 L. Ed. 1246;

N. L. R. B. v. Indiana Desk Co., 149 F. (2d) 987, 990-991 (C. C. A. 7, 1945);

Loew's, Inc., v. Basson, 46 Fed. Supp. 66, 71-72, cited *supra;*

Authorities cited under Points II(6) and II(20), *supra.*

3. If statutory seniority may be whittled down by a collective bargaining representative, then *every other right* in the reemployment law is also subject to adverse alteration to the detriment of a returning veteran; and also, and on the same principle, every labor law fixing wages, hours and working conditions for private employees may be undercut to the detriment of the statutory beneficiaries by a collective bargaining agent. There would be *no security* for employees of any class against the hazards of a collective bargaining representative's preferences.

4. Besides affirmatively stating *twice* that the seniority right of a veteran *cannot* be cut down by collective bargaining, the Supreme Court summed up its view of the certainty of the reemployment law in this sentence:

> "The restoration provisions define the *very character* of the place not only to which the veteran must be restored but equally from which he is not to be discharged."

Trailmobile Case, 331 U. S. at pp. 55, 58-59;

Fishgold Case, 328 U. S. at p. 285.

5. Seniority systems may be altered, and are constantly altered, to the disadvantage of certain employees for the benefit of others. Nonveteran employees have no security against such discriminatory alterations.

Elder v. New York Cent. R. Co., supra;

Text: 31 *Am. Jur.* 875, Labor, Sec. 102;

Note: 117 *A. L. R.* 825;

Point II(1)(d), *supra.*

It was in view of this very circumstance, and apparently no other that, having already provided in STSA, Sec. 8(b), that the veteran should have his former position or "a position of like seniority," it repetitiously provided in Sec. 8(c) that he must be restored "without loss of seniority." This meant that he was to have his former seniority rank, *unimpaired and without question.* The labor leaders who helped frame the reemployment section of the STSA must have so understood it.

6. The basic *Gauweiler Case* holding that a veteran's seniority on restoration is "subject to the well established and accepted routine of collective bargaining, so far as this particular right of seniority is concerned" is wholly inharmonious with STSA, Sec. 8(b,c), itself, and with the Supreme Court's statements in the *Trailmobile Case* that:

> ". . . he was given security not only against complete discharge, but also against demotion for the statutory year. And demotion was held to mean impairment of 'other rights,' including his restored *statutory seniority* for that year." (331 U. S. p. 56.)

And,

> "For the statutory year indeed, this meant that the restored rights could not be altered adversely by the usual processes of collective bargaining," etc. (331 U. S. 58-59.)

And, that STSA, Sec. 8(c), gives the reemployed veteran

> ". . . a special statutory standing in relation to 'other rights' " . . . and creates "to that extent a preference for him over nonveterans" . . . for the reemployment year. (331 U. S. 60.)

7. In each of the *Gauweiler Cases* there was an earnest, dissenting opinion, and each was decided by the Third Circuit Court of Appeals in two-to-one opinions. Of the nine District and Circuit Court judges, who passed on these four cases, *five* held the new superseniority for union officials void as to veterans for one year; *four* held it valid. (See majority and dissenting opinions, 162 F. (2d) 448, 544, 546, 549, and District Court opinions, 69 Fed. Supp. 294, 11 C. C. H. Labor Cases, pp. 70071-70072.)

8. Besides being unique, and out of harmony with the repeated views of the Supreme Court, the *Gauweiler Cases* are inapplicable here on the facts, since: (1) The employer here did not find it "inconvenient" to exempt restored veterans from the superseniority provision; and the merry-go-round of seniority rights discussed in the *DiMaggio* and *Payne Cases* does not apply. [See Point II(3,4), *supra;* R. pp. 125-126.] Also, (2) the 1945 Agreement expressly referred to STSA, Sec. 8, in fixing the seniority rights of various classes of employees in Art. IV, Sec. 6, whereas, it does not affirmatively appear from the *Gauweiler Cases* that any of the collective agreements there involved contained any such express reference fixing veterans' seniority separately from other employees.

9. On the law and facts, therefore, the rule in the *Gauweiler Cases* should not be adopted or followed by this Court. It ought, in fact, to be declared unsound; and the scope of a collective bargaining representative's authority should be declared confined within the limits fixed by

Erie R. Co. v. Williams, supra; and authorities cited under Point II(6, 20, 23-25), *supra.*

Conclusion.

The District Court's judgment was sound in law and fact, and should be affirmed.

The circumstances here are such that in doing so, this Court, in the interest of public understanding, may well point out that statutes fixing wages, hours and working conditions, and creating individual rights based thereon, are not subject to alteration or impairment through the medium of collective bargaining; and that employers and collective bargaining agents are bound to conduct their negotiations subject to and in conformity with such laws, otherwise their agreements will be held *pro tanto* void.

This principle has been *twice* stated by the Supreme Court in connection with the very statute here involved; and in the interest of public understanding, it should now be reaffirmed and given effect by this Court.

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